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IN THE

Supreme Court of the United States

October Term, 1976

No. 76-1858

CHARLES ALEXANDER,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Preliminary Statement

This is a petition for a writ of certiorari to review the order of the Court of Appeals of the State of New York, dated April 21, 1977, denying petitioner's application for a certificate granting leave to appeal to said Court from an order of the Supreme Court of the State of New York, Appellate Division, First Department, dated February 10, 1977. That decision unanimously affirmed, without opinion, the May 18, 1976 judgment of the Supreme Court, Bronx County, which convicted petitioner, after a trial by jury, of

the crime of Criminal Sale of a Controlled Substance in the First Degree (New York Penal Law §220.43) and sentenced him to an indeterminate term of life imprisonment with a minimum term of twenty-five years.

Upon information and belief, petitioner is presently incarcerated pursuant to that judgment.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3). The order of the Appellate Division was entered on February 10, 1977, *People* v. *Alexander*, 56 A.D.2d 740 (1st Dept. 1977). The certificate denying leave to appeal to the Court of Appeals was dated April 21, 1977, and signed by Associate Judge Jones of that Court.

Question Presented

Whether an application for a wiretap extension order was in compliance with the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2516, where such application was filed by a police officer pursuant to the specific authorization of the County Prosecutor?

Statement of the Case

On November 9, 1973, an order authorizing a wiretap upon the telephone of one Geraldine Shore was issued by the Superior Court of New Jersey upon the sworn application of an Assistant County Prosecutor of Essex County, who sought it pursuant to the written authorization of the

County Prosecutor, Joseph Lordi. Thereafter, on November 15, 1973, New Jersey authorities intercepted and recorded three conversations between Shore and Charles Alexander, petitioner herein, concerning arrangements for a sale of cocaine by petitioner to Shore. Following expiration of this original wiretap order, two extension orders were granted, on November 29, and December 16, 1973. Application for each extension was made by a police detective assigned to the Essex County Prosecutor's Office, acting pursuant to the County Prosecutor's written authorization (see Appendix, *infra*, pp. A1-A4). During the period covered by these extension orders, three additional conversations between petitioner and Shore were recorded, all relating to illegal dealing in cocaine between the two. In mid-December, 1973, the New York Police Department was informed of the wiretap by the New Jersey authorities. Based upon the information which it had yielded concerning petitioner's criminal activities, the Bronx County District Attorney's Office sought and, on January 11, 1974, was granted permission by the New York Supreme Court to execute a wiretap upon petitioner's telephone.

On January 29, 1974, petitioner sold a quantity of cocaine to an undercover New York Police detective for $3,000 at a meeting arranged by a confidential informant. On March 7, 1974, petitioner was indicted by the Grand Jury of Bronx County and on April 12, 1976, following a trial by jury, he was convicted of Criminal Sale of a Controlled Substance in the First Degree. Although petitioner's pretrial motion to controvert the New Jersey wiretap orders had been denied, the prosecution did not present any evidence procured therefrom. A judgment of conviction was entered

on May 18, 1976, and petitioner was sentenced to an indeterminate term of life imprisonment with a minimum term of twenty-five years.

A direct appeal was pursued, and the judgment appealed from was unanimously affirmed, without opinion, by the Appellate Division, First Department, on February 10, 1977. Petitioner then applied to the Court of Appeals for a certificate granting leave to appeal pursuant to Section 460.20 of the New York Criminal Procedure Law; leave to appeal was denied on April 21, 1977.

The petition now before this Court raises a question considered below, namely, whether, the procedure employed in applying for the two wiretap extension orders by the New Jersey authorities fully complied with the mandates of 18 U.S.C. 2516. We believe that it did and hence petitioner's request for a writ of certiorari should be denied.

ARGUMENT

POINT ONE

The wiretap extension orders issued by the Superior Court of New Jersey were in full compliance with 18 U.S.C. 2516.

We believe that the two wiretap extension orders of which petitioner complains were obtained through a procedure fully complying with 18 U.S.C. 2516, which empowers the principal prosecuting attorney of any political subdivision of a state to apply for such an order provided that a state statute authorizes him to do so (18 U.S.C. 2516 (2)).

Here, although the Essex County Prosecutor delegated to a detective the duty of preparing and filing the applications and supporting affidavits for each order, his own affidavit submitted therewith clearly demonstrate that he, the County Prosecutor, made the decision to apply for the wiretap orders, not the detective as petitioner would have us believe. In each affidavit, the County Prosecutor stated that "application is hereby made by me for an Order authorizing the extension of the interception of wire communications", and swore that he had reviewed the detective's proposed application (which included, *inter alia,* the facts relied upon in seeking each extension) and asserted his belief that the wiretap would yield evidence of the crime of Sale and Possession of a Controlled Dangerous Substance. We believe that the procedure followed gave the "assurance of a responsible executive determination of the need and justifiability of each interception," *United States* v. *Giordano,* 416 U.S. 505, 517, 94 S. Ct. 1820 (1974). The mere fact that the detective, pursuant to state law (*see* N.J. State Ann. 2A-156 A-8, *State* v. *Sidoti,* 120 N.J. Super. 208, 293 A.2d 678 (1972)) performed the ministerial duties of preparing the application papers and submitting them to the court does not, we submit, dilute this assurance in any way, and therefore does not evade the mandate of Sec. 2516 (*cf. United States* v. *Tortorello,* 480 F.2d 764, 766-77 (2d Cir. 1973); *United States* v. *Becker,* 461 F.2d 230 (2d Cir. 1972).

In any event, the People's cognizance of petitioner's dealing in cocaine was not derived exclusively from conversations intercepted after the issuance of the extension orders. To the contrary, a series of three telephone conver-

sations between petitioner and Geraldine Shore concerning his arrangements to sell her cocaine was recorded on November 15, 1973, during the period covered by the original, uncontested court order, and were relied upon by the New York authorities in seeking an order for a wiretap on petitioner's telephone from the New York Supreme Court. Assuming, *arguendo*, that the New Jersey extension orders were improperly obtained, this conversation nonetheless provided an independent, untainted source for New York's knowledge of petitioner's trading in drugs, *cf. Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385, 392, 40 S. Ct. 182, 193 (1920), *United States* v. *Falley*, 489 F.2d 33 (2d Cir. 1973). Furthermore, a conversation between Shore and an unnamed party was intercepted on January 4, 1974, and indicated that Shore had been dealing in drugs with petitioner but had stopped because of recent developments. As petitioner, not being a party to this latter conversation, has no standing to challenge any impropriety regarding its interception, *Alderman* v. *United States*, 394 U.S. 195, 89 S. Ct. 961 (1969), we submit that it provided the New York authorities with a second independant source of knowledge of his illegal activities. Therefore, we see no reason why the subsequent indictment arising from his sale of cocaine to an undercover police officer should be dismissed. Similarly, we see no taint which would result in the suppression of the New York wiretap. In any event, that wiretap could not have prejudiced petitioner in any way, for no information derived therefrom was introduced into evidence at his trial.

For all of the foregoing reasons, we respectfully submit that this Court should decline jurisdiction.

Conclusion

The petition for writ of certiorari should be denied.

Respectfully submitted,

Mario Merola
District Attorney
Bronx County
Attorney for Respondent

Robert Plautz
Timothy J. McGinn
Assistant District Attorneys
Of Counsel

August, 1977

APPENDIX

A1

Affidavit of Joseph Lordi
Dated November 1973

Authorization and Application for Extension

SUPERIOR COURT OF NEW JERSEY

COUNTY OF ESSEX

JOSEPH P. LORDI
Essex County Prosecutor
Essex County Courts Building
Newark, New Jersey 07102
Telephone: (201) 961-7470

In the Matter of the Interception of Wire Communications of a Female Known as "Gerry" and Other Unidentified Persons Over Telephone Facility Number Area Code 201-926-2443 and 926-4044, Listed to Geraldine Shore, 130 Chancellor Avenue, Newark, New Jersey, Apartment 3-B, and Recording Such Intercepted Conversations Relating to Certain Criminal Activities, To Wit: The Crimes of the Sale and Possession of a Controlled Dangerous Substance (N.J.S. 24:21-20), Distributing a Controlled Dangerous Substance (N.J.S. 24:21-19) and Conspiracy (N.J.S. 24:21-24)

State of New Jersey)
) ss.
County of Essex)

JOSEPH P. LORDI, of full age, being duly sworn according to law, upon his oath, deposes and says:

I am the Prosecutor of Essex County, New Jersey. I have reviewed the attached proposed application for an

Order authorizing the extension of the interception of a wire communication. It is my belief that such interception may provide evidence of the commission of the offenses of the Sale and Possession of a Controlled Dangerous Substance (N.J.S. 24:21-20).

Authorization is hereby granted to Detective Thomas Redden of the Essex County Prosecutor's Office Narcotics Squad to execute and submit the attached application to a Judge authorized to receive the same, and application is hereby made by me for an Order authorizing the extension of the interception of wire communications as described therein.

/s/ Joseph P. Lordi
Joseph P. Lordi
Essex County Prosecutor

Sworn and subscribed to before me this
—— day of November, 1973.

Affidavit of Joseph Lordi
Dated December 19, 1973

Authorization and Application for Extension

SUPERIOR COURT OF NEW JERSEY

County of Essex

Joseph P. Lordi
Essex County Prosecutor
Essex County Courts Building
Newark, New Jersey 07102
Telephone: (201) 961-7470

In the Matter of the Interception of Wire Communications of a Female Known as "Gerry" and Other Unidentified Persons Over Telephone Facility Number Area Code 201-926-2443 and 926-4044, Listed to Geraldine Shore, 130 Chancellor Avenue, Newark, New Jersey, Apartment 3-B, and Recording Such Intercepted Conversations Relating to Certain Criminal Activities, To Wit: The Crimes of the Sale and Possession of a Controlled Dangerous Substance (N.J.S. 24:21-20), Distributing a Controlled Dangerous Substance (N.J.S. 24:21-19) and Conspiracy (N.J.S. 24:21-24)

State of New Jersey)
) ss.
County of Essex)

Joseph P. Lordi, of full age, being duly sworn according to law, upon his oath, deposes and says:

I am the Prosecutor of Essex County, New Jersey. I have reviewed the attached proposed application for an

Order authorizing the extension of the interception of a wire communication. It is my belief that such interception may provide evidence of the commission of the offenses of the Sale and Possession of a Controlled Dangerous Substance (N.J.S. 24:21-19).

Authorization is hereby granted to Detective Thomas Redden of the Essex County Prosecutor's Office, Bureau of Narcotics and Controlled Dangerous Substances of Essex County to execute and submit the attached application to a Judge authorized to receive the same, and application is hereby made by me for an Order authorizing the extension of the interception of wire communications as described therein.

/s/ JOSEPH P. LORDI

JOSEPH P. LORDI
Essex County Prosecutor

Sworn and subscribed to before me this
19 day of December, 1973.

/s/ (illegible)